IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1345

JOSEPHINE GABALDON, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

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vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

The petitioners, Josephine Gabaldon, Lawrence Quintos and George Aglepay, respectfully pray that a Writ of Certiorari issue to review the final judgment and opinion of the Court of Appeal of the State of California for the Fifth Appellate District, an intermediate appellate court, entered in this proceeding on December 4, 1974. Review was denied by the Supreme Court of California in an order dated January 31, 1974, denying a petition for hearing. (App. "B").

Opinion Below.

The opinion of the Court of Appeal, dated December 4, 1973, set forth in Appendix "A", affirmed the judgment of the Superior Court of Tulare County, California, which issued a brief order granting a motion for judgment on the pleadings without opinion.

Jurisdiction.

This Petition for a Writ of Certiorari is being filed within ninety days of the time of final judgment of the Court of Appeal. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Is the decision below, holding that there can be no governmental action involved in conduct of private parties, except where they act under governmental compulsion, in conflict with decisions of this Court?

2. Is there governmental action by the State of California involved in compulsory full membership in a union, through an agreement between the union and the employers, when such an agreement is authorized, approved, encouraged, protected, and made enforceable at law and in equity, under the statutes of the State as well as under its common law, both as expressly construed to that effect by its highest Court?

4. Does the case present important questions of constitutional law which should be settled by this Court?

5. Does the case present an issue of major public importance?

Constitutional and Statutory Provisions Involved.

Petitioners invoked below the protection of their rights under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. They also invoked 42 U.S.C. § 1983, making every person, who under color of any statute, custom or usage

of a state, deprives another person of any rights, privileges or immunities secured by the Constitution, liable to the party injured in an action at law or suit in equity.

Petitioners claimed they were subjected to injury and damages by the respondents acting under the Labor Code of California, §§ 921-923, 1011, 1012, 1015-1018, and 1126, the Business and Professions Code of California, § 16703, and the common law of the state, all as authoritatively interpreted by the Supreme Court of California.

The constitutional and statutory provisions named above appear at pages 16-25 of the Appendix.

Statement of the Case.

Petitioners, who are vineyard workers, brought a class action in the Superior Court of Tulare County, California, against the respondents-employers and the union. They asked for an injunction, for declaratory relief and for damages because of an agreement between the employers and the union requiring compulsory union membership as a condition of employment. The complaint alleges that the full union membership requirement is coupled with other arbitrary and unreasonable conditions, including (1) a union hiring hall, (2) priority of employment of strikers, and (3) the right of the union to force the discharge of any employee whom it finds to be engaged in anti-union activity. The complaint alleges that the union did not represent a majority or a substantial portion of the workers employed by the growers and that the union by agree-

ment with the growers is the exclusive bargaining agent of the employees.

The agreement was entered into July 29, 1970. Petitioners promptly filed suit the following August 13. A demurrer was overruled November 23, 1970, but a subsequent motion for judgment on the pleadings raising the same issues was granted November 16, 1971. The judgment was affirmed by the Court of Appeal December 4, 1973.

During the course of the litigation the agreement expired by its terms. The Court of Appeal denied a motion of respondents to dismiss the complaint as moot, holding that the question of damages is still in controversy. (Appendix A, p. 5.)

REASONS FOR GRANTING WRIT.

I

Decision Below Contrary to Decisions of This Court on Governmental Action.

The Court below held that no governmental action is present since the union shop agreement was not entered into under compulsion of any state law coercing the private parties to include a union shop clause in the collective agreement.

This decision below is squarely contrary to the uniform decisions of this Court that governmental action is present not only where the state itself acts directly on the citizen to deprive him of rights under the Federal Constitution, but also where it is significantly involved in the deprivation by private persons of such rights by authorizing, protecting or encouraging the injury inflicted by those private persons.

This Court has expressly held that governmental action is involved where Congress by statute authorizes a union shop agreement, and an employer and a union proceeding thereunder executes such an agreement, even though the statutory provision is only permissive, and there is no compulsion by Congress to make the agreement. The Court so decided in *Railway Employees Dept. AFL v. Hanson,* 351 U.S. 225, 232 (1956), holding:

> "The enactment of the federal statute authorizing a union shop agreement is the governmental action on which the Constitution operates though it takes a private agreement to invoke the federal sanction."

The statute in *Hanson* occupied the whole field in the railroad and airline industries with a uniform rule applicable throughout the country authorizing a limited

and restricted form of union shop. It not only struck down conflicting state right to work laws then existing but also rendered all of the states powerless to enact similar laws in the future. It authorized a form of union shop unknown to the common law and set forth a detailed pattern to be observed in its administration. The express provision superseding state laws to the contrary was not controlling, because a statute authorizing an agreement in interstate commerce would occupy the field to the exclusion of state laws unless some contrary intent on the part of Congress was shown, which was not the case. *Hanson* in effect overruled previous lower federal court decisions, *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58 (CA 2, 1953), and *Wicks v. Southern Pacific Co.*, 231 F.2d 130 (CA 9, 1956), construing the same statute as importing no governmental action.

In *Terry v. Adams*, 345 U.S. 461, 462 (1953) and in *Smith v. Allwright*, 321 U.S. 649, 663-664 (1944), the Court found governmental action in the exclusion of blacks from party primaries, notwithstanding the circumstance as stated in *Terry* that "no state law directed such exclusion."

The Court has held governmental action to be present in many other cases in which the state, while not directly compelling the deprivation of constitutional rights, was nevertheless significantly involved in the deprivation of them by private parties. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Court held that state action was significantly involved in the refusal of owners of private property to rent residences to blacks. The refusal was based upon an amendment to the Constitution of California designed to protect the rights of owners of real estate from invasion by providing that

neither the state nor any of its agencies shall abridge the right of the owner to rent to such person as he chooses. The refusal of the owners to rent to the blacks was held to reflect significant state involvement, carrying with it the authorization and encouragement of the conduct of private parties, just as the state has authorized and encouraged the full union shop in this case.

The decision of a regulatory commission in the District of Columbia permitting the continuation of radio programs on street cars allegedly in violation of the right of privacy of patrons was held to constitute sufficient governmental action to enable protesting passengers to invoke the First and Fifth Amendments, *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 (1952).

In *McCabe v. Atchison, Topeka & Santa Fe R.R. Co.,* 235 U.S. 151, 161, 162 (1914), the Court declared that state action is present when a rail carrier acts under the authority of state law to discriminate in furnishing equipment to its patrons.

Where, as here, government has clothed a union as the bargaining representative with powers comparable to those possessed by a legislative body, both to create and restrict the rights of those whom it represents, its powers are subject to constitutional limitations in the same way as the acts of a legislature. This rule applies where the issue is racial discrimination as in *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192, 198, 202, 89 L.Ed. 173 (1944), or the validity of the requirement of a non-communist affidavit by a labor union official as in *American Communications Assn. v. Douds,* 339 U.S. 382, 401-402, 94 L.Ed. 926 (1950).

Other cases are to the same effect as those already cited. *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *Marsh v. Alabama,* 326 U.S. 501 (1946); *Food Employees v. Logan Valley Plaza,* 391 U.S. 308 (1968); *Robinson v. Florida,* 378 U.S. 153 (1964); *United States v. Guest,* 383 U.S. 745, 755, 756 (1966) *Anderson v. Martin,* 375 U.S. 399, 402-403 (1964).

The Court below was mistaken in interpreting *Moose Lodge v. Irvis,* 407 U.S. 163 (1972), as indicating a trend away from the decisions cited above. The Court there, while refusing to hold that state action was involved in the refusal by a private club, dispensing alcoholic beverages under a state license imposing a pervasive regulation, to provide food and beverage service to a black guest, nevertheless cited with approval its decision in *Reitman v. Mulkey, supra,* saying:

> "Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v Mulkey, 387 US 369, 380, 18 L Ed 2d 830, 838, 87 S Ct 1627 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." (407 U.S. at 173).

A little later on the Court distinguished the ruling of the Court in *Moose Lodge* from that in *Reitman v. Mulkey* in a way connoting approval of both of them as both right and consistent with one another, saying:

> "However detailed this type of regulation [in *Moose Lodge*] may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." (407 U.S. at 176, 177).

What the Court said in *Moose Lodge* indicates rather clearly that the Court there was continuing to observe and apply the rule that state action is present in conduct which fosters and encourages violation of the Federal Constitution, although governmental regulation of a general nature, however pervasive, of a club or a corporation is not sufficient to constitute state action with respect to its activities. Nevertheless the rule is otherwise where the governmental regulation is directed to the specific subject matter of complaint and authorizes, fosters and encourages the acts abridging fundamental rights of the individual. *Moose Lodge* is thus consistent with the contention of petitioners with respect to state action by California authorizing, encouraging and protecting the full union shop which is the specific subject of complaint in this case.

II

California Authorizes, Approves, Encourages and Protects Union Shop.

The Court below held that California exercises benign neutrality toward the union shop. The respondents were of a different opinion when, arguing in support of their demurrer to the complaint in the Superior Court, they immediately sprung to the defense of their union shop by urging that "union shops are favored in California", and that "union shop agreements are not only legal but are encouraged and protected." They cited decisions of the Supreme Court of the State bearing out those propositions under the common law, and, more importantly, under the statutes of the State.

Many years ago that Court put its stamp of approval upon the validity of the union shop and the closed shop under the common law. *Parkinson Co. v. Building*

Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908); *Pierce v. Stablemens' Union,* 156 Cal. 70, 103 Pac. 324 (1909). In 1933 the California legislature enacted sections of the Labor Code dealing with the union shop and the closed shop. The Court below construed those sections as evidencing only a benign neutrality toward the union shop. But the Supreme Court, the highest court of the State, had previously held that these same sections authorized, approved, encouraged and protected the union shop.

In *Stephenson v. City of Palm Springs,* 52 Cal.2d 407, 340 P.2d 1009 (1959), the principal issue was the validity of an ordinance of the City of Palm Springs declaring closed and union shop agreements illegal. The Court held the ordinance invalid because it was in conflict with state law holding such agreements to be encouraged and protected under the Labor Code, saying at page 410:

> "It is the announced intention of the Palm Springs ordinance (§ 2920) 'to prohibit closed shop and union shop agreements of any type which are neither prohibited nor authorized by state laws.' But this stated intention to avoid either forbidden duplication or forbidden conflict (Pipoly v. Benson (1942), 20 Cal. 2d 366, 370-371 [125 P. 2d 482, 147 ALR 515]) is immediately contravened by the fact that §§ 2921, 2922 and 2923 of the subject ordinance purport to declare that all closed and union shop agreements are illegal, void and criminal, *whereas under state law (Lab. Code §§ 920-923, 1115-1122, p. 162) such agreements are encouraged and protected.*" (Italics ours).

In *Chavez v. Sargent*, 52 Cal.2d 162 (1959), the Court held invalid a County ordinance prohibiting compulsory union membership. The Court based its decision on the conflict of the ordinance with state statutes authorizing, encouraging and protecting union security agreements providing for the union shop form of compulsory union membership, declaring at pages 196-197:

> "Neither before nor since the 1947 and 1955 enactments * * * has California's statutory law prohibited collective bargaining agreements relating to union security, insofar as the word 'security' is used in a legitimate sense. * * * State laws as they should be interpreted and applied, at least since the 1947 and subsequent enactments, continue to *permit, to encourage and protect* collective bargaining agreements which have been freely negotiated and entered into by and between employees' lawfully authorized organizations and their employers * * *. *These interests*, on the part of labor, of course *include reasonable union security clauses*, * * *."

The Court in other parts of its decision in that case speaks of state enactments which "permit" collective bargaining agreements including "reasonable union security clauses" (52 Cal.2d at 197) and at another place mentions "authorized negotiations for union security" (52 Cal.2d at 213). In the present context a permissive statute is equally sufficient to constitute the state action necessary to invoke the protection of the Constitution. *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225, 229, 231 (1956); *McCabe v. Atchison, T & SF R. Co.*, 235 U.S. 151, 158, 161-2 (1914); *Reitman v. Mulkey*, 387 U.S. 369, 379 (1967).

In *Retail Clerks Union v. Superior Court*, 52 Cal. 2d 222, 224-227 (1959) the Court similarly held invalid a county right to work ordinance "for the reasons explained in Chavez v. Sargent * * *." (52 Cal. 2d at 224-5).

Thus when the Court of Appeal says that the policy of the State of California is one of "benign neutrality" towards the union shop, its holding is to no avail because it is in inescapable conflict with the decisions of the Supreme Court of the State. Whether this rule under which the respondents proceeded constitutes governmental action sufficient to invoke the protection of the Constitution of the United States is a question of federal law under which the meaning of the state statute must be read as the highest Court of the State has interpreted it. *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Minnesota Ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Hebert v. Louisiana*, 272 U.S. 312, 317 (1926); *Marshall v. Sawyer*, 301 F. 2d 639, 646 (CA 9, 1962). In *Minnesota Ex rel. Pearson v. Probate Court, supra*, Chief Justice Hughes declared:

> "For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the state has interpreted it." (309 U.S. at 273).

Under this rule the provisions of the Labor Code as construed by the Supreme Court of California must be read as authorizing, approving, encouraging and protecting the union shop. They constitute significant, substantial and sufficient state action to invoke the protection of the Federal Constitution.

The union shop thus authorized and encouraged by California is the full union shop. As the California

cases already cited show the State by statute and by common law sanctions not only the union shop but the closed shop under which no person may be employed who is not already a member of the union. There is no restriction upon either type of compulsory membership, except where membership in the union is denied by virtue of some unlawful ground such as the race of the employer. *James v. Marinship Corp.*, 25 Cal.2d 721, 731, 155 P.2d 329 (1944). What is required is full union membership subjecting the employee to all of the duties and obligations imposed by the Constitution, By-Laws, rules and regulations of the organization.

This form of full union membership differs markedly from the restricted form of union shop authorized under the two federal labor relations statutes[1] under which nothing more may be required as a condition of employment save the payment of compensation to the union for its services as collective bargaining representative. Those statutes afford a substantial, although inadequate, measure of protection from the abuses which Congress has found to exist in compulsory union membership.[2]

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[1]The National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, and the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*

[2]In the 80th Congress, 1st Session, Senate Report No. 105 on S. 1168, a bill which formed one of the principal bases of the Labor-Management Relations Act of 1947, the Committee on Labor and Public Welfare, speaking of the experience under § 8(3) of the original National Labor Relations Act permitting agreements for compulsory union membership in states allowing such agreements, stated: "We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged." (p. 6.) The resulting reform is reflected in the amended National Labor Relations Act, 29 U.S.C. § 158(a)(3) and indirectly in the Railway Labor Act, 45 U.S.C. § 152, Eleventh, restricting

(This footnote is continued on next page)

All of the abuses which Congress has legislated against are present in the full union shop in California covering employees such as petitioners who as agricultural workers are excluded from the coverage of the two federal statutes. Compare, for instance, *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 187 P.2d 679 (1947) upholding a political assessment against an objecting union member with *International Machinists v. Street*, 367 U.S. 740 (1961) condemning use over objection of employees of initiation fees, dues and assessments under the Railway Labor Act for political purposes.

III

Case Presents Important Question of Constitutional Law Which Should Be Settled by This Court.

The California Court of Appeal, in a decision denied review by the Supreme Court of the State, has enforced a rule directly contrary to the decisions of this Court on an important question of constitutional law. This Court in case after case has decided that where private parties are acting under the authority of a state or where their action presents some other form of significant state involvement, there is sufficient governmental action to invoke the protection of the Bill of Rights of the Federal Constitution. The Court below has decided to the contrary in holding that governmental action is not present unless the private parties are acting under compulsion of the State. This question is one of too much moment to be left unsettled in the Ninth Circuit or elsewhere. It is one that should be settled by this Court in keeping with its past decisions.

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the union shop to a requirement for payment of initiation fees and dues, to compensate the union for its services as collective bargaining representative.

IV

Case Presents Issue of Major Public Importance.

The question whether a citizen of the United States in the Twentieth Century may be compelled against his will to belong to a private organization and to be subject to its direction and control is one of major public importance. The question here takes the form of whether a full union shop comports with the Bill of Rights.

Millions of employees, including agricultural workers such as petitioners, are excluded for one reason or another from the coverage of the two federal labor relations statutes and the protection of their fundamental rights is a matter of serious national concern.

The question of the constitutionality of compulsory union membership was presented to this Court in *Railway Employees Dept. AFL v. Hanson, supra,* 351 U.S. at 225 (1956), where there was an attack on the union shop clause of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, a statute which declared that a union shop "shall be permitted". The Court, however, pointed out that a proviso to the statute limited the grounds of discharge of an employee to failure to tender to the union payment of dues and initiation fees. It held that employees could be required to make those payments to compensate the union for its services as collective bargaining representative. The Court expressly reserved the question whether other requirements could be imposed upon them without violation of their constitutional rights (351 U.S. at 238). It reiterated this reservation in *International Machinists v. Street,* 367 U.S. 740, 746, 749 (1961). In the latter case the Court construed the Railway Labor Act as proscribing the use

of the initiation fees, dues and assessments for political purposes over the objection of employees, thus making unnecessary any decision of the constitutional question. The instant case presents other phases of the same reserved question, namely whether full union membership may be imposed consistently with the constitutionally guaranteed freedom of association and right to work.

Freedom of association is one of the most fundamentally important of the rights secured by the Constitution. *Gibson v. Florida Investigating Committee,* 372 U.S. 539, 543, 544 (1963); *Bates v Little Rock,* 361 U.S. 516, 522, 523 (1960). This Court declared in *Williams v. Rhodes,* 393 U.S. 23 (1968):

> "We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." (393 U.S. at 30-31).

Freedom to associate of necessity means as well freedom not to associate. *NLRB v. Granite State Board,* 409 U.S. 213, 216 (1972); *Pappas v. Stacy,* 151 Me. 36, 116 A.2d 497, 500 (1955); appeal dismissed *Stacy v. Pappas,* 350 U.S. 870 (1959). See also *Board of Education v. Barnette,* 319 U.S. 624, 638 (1943).

The right to work is likewise a fundamental constitutional right. *In re Griffiths,* 37 L.Ed.2d 910, 914 (1973); *Sugarman v. Dougall,* 37 L.Ed.2d 853, 859 (1973); *Truax v. Raich,* 239 U.S. 33, 41 (1915); *Cummins v. Missouri,* 4 Wall. 277, 321, 322 (1867).

The Declaration of Human Rights of the United Nations states that "everyone has the right to freedom of

* * * association"; "no one may be compelled to belong to an association" (Article 20), and "everyone has the right to work" (Article 23).

The strong showing of disregard by California of these two fundamental rights recognized as they are by the decisions of this Court interpreting the Constitution, by the two federal labor relations statutes, as well as by the Declaration of Human Rights is surely of sufficient importance to justify review by this Court.

Conclusion.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal, Fifth Appellate District of the State of California.

Dated: March 4, 1974.

Respectfully submitted,

JONATHAN C. GIBSON,
REX H. REED,
JOHN L. KILCULLEN,
RICHARD B. ISHAM,
Counsel for Petitioners.

APPENDIX "A."

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Fifth Appellate District.

Josephine Gabaldon et al., Plaintiffs and Appellants, v. United Farm Workers Organizing Committee et al., Defendants and Respondents. 5 Civil No. 1736 (Sup. Ct. No. 70106).

Filed: Dec. 4, 1973.

APPEAL from a judgment of the Superior Court of Tulare County. John Locke, Judge. Affirmed.

Rex H. Reed, Gall, Lane, Powell & Kilcullen, John L. Kilcullen, Gibson & Kennerson, Jonathan C. Gibson, Jacobus, Isham & Humpal, Frederic A. Jacobus and Richard B. Isham for Plaintiffs and Appellants.

Cohen, Farnsworth, Denison, Carder & Englehardt and Stephen Engelhardt for Defendants and Respondents.

Plaintiffs appeal from a judgment on the pleadings in favor of the defendants rendered on the ground their complaint does not state facts sufficient to constitute a cause of action.

A motion for judgment on the pleadings is treated identically to a demurrer. (*Welshans v. City of Santa Barbara* (1962) 205 Cal.App.2d 304, 305.) Consequently, the facts alleged in the complaint must be assumed to be true and liberally construed in favor of the party against whom the motion is made. (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 275; *Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

The named plaintiffs are farm workers. The defendant United Farm Workers Organizing Committee (here-

inafter "union") is an unincorporated labor organization; the other defendants are 26 major growers (hereinafter "growers") of agricultural crops in the southern San Joaquin Valley. The plaintiffs commenced this class action on behalf of themselves and others similarly situated, alleging that on July 29, 1970, the union and growers entered into a collective bargaining agreement; they complain that some of the provisions of the contract, hereinafter summarized, have deprived the plaintiffs of their constitutional rights. It is alleged that the union is designated as the sole collective bargaining agent for the workers, although they do not represent a "majority or substantial portion of the agricultural workers including plaintiffs. . . ." It is further alleged that plaintiffs ". . . for several years have worked for and have been employed by defendant growers on terms and conditions freely arrived at between themselves and said growers while enjoying the freedom to work and contract individually with said defendant growers without restraint, obstruction, interference or hindrance from any source." The complaint continues that plaintiffs are required to work under the terms of the contract, among the requirements of which are four provisions of which they make special complaint. These in summary are:

(1) Membership in defendant union is a condition of employment with defendant growers and that the employees of the growers as of the date of the contract must become members of the union within seven days of the execution of the contract or suffer termination.[1]

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[1]Union security provisions similar to the one here involved are often given different labels depending on the degree of union security provided. A "union shop" provision, for example, is one under which the employer is free to hire nonunion employees but they must become employees within a specified period of time.

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(2) Whenever any grower requires workers he shall notify the union, which will use its best efforts to furnish the required workers; if unable to do so, the grower may then procure workers from other sources, but they too must become union members within seven days. The hiring clause of the contract provides referral priority in the order of (a) strikers, (b) the growers of prior employment, (3) new registrants.

(3) The union is given the right to require the grower to discharge any worker whom the union charges with antiunion activity when it presents to the employer written evidence of such activity. The worker is given the right to a hearing, but the union is granted the power to make the final decision with respect to the discharge.

(4) The grower is required to deduct or "check off" union initiation fees, dues and assessments from the employees' wages upon presentation of the individual authorization of the worker.

It is then alleged in substance that by virtue of the execution of the contract, defendant union and growers have and will continue to enforce the terms of this contract, in violation of plaintiffs' freedom of association, right to work, freedom to pursue the occupation of their choice, freedom of thought, freedom of political

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A "closed shop," on the other hand, is one under which all employees must be union members unless the union is unable to furnish workers. If the union is unable to furnish workers, the employer can get nonunion workers but only if they become union members before the work commences. (*Chavez v. Sargent* (1959) 52 Cal.2d 162, 177-178, fn. 4.) Appellant characterizes the agreement herein as a "full union shop" or one in between a "closed shop" and a "union shop." Regardless of the tag put on the clause of this collective bargaining agreement, it is basically a "union security provision" and is treated almost identically to the others. (See *Chavez, supra,* fn. 4.)

action, freedom from unwarranted invasion of their right to privacy and other fundamental rights and liberties in violation of their constitutional rights secured under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, and sections 1, 9, 10 and 13 of article I of the California Constitution;[2] and that as a consequence of the enforcement of the agreement plaintiffs and members of the class have been threatened with discharge, have in fact been discharged, demoted, subjected to job classification, discrimination, transfer, and have been refused employment.

Plaintiffs pray for damages in excess of $5,000, a declaration of rights and responsibilities of all the parties that the contract between the union and the growers is void and, thirdly, for an injunction against enforcing the provisions of the contract.

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[2]Although appellants allege violation of rights under the California Constitution, they made no serious argument in support thereof in the trial court and have totally abandoned any argument in support thereof on appeal, placing their sole reliance upon the United States Constitution. This shift is probably dictated by the fact that union security covenants have been approved in California as a proper union objective. (*C. S. Smith Met. Market Co. v. Lyons* (1940) 16 Cal.2d 389; *McKay v. Retail Auto S.L. Union No. 1067* (1940) 16 Cal.2d 311, cert. den. 313 U.S. 566; *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88* (1960) 53 Cal.2d 455; *Messner v. Journeymen Barbers etc. International Union* (1960) 53 Cal.2d 873; *Shafer v. Registered Pharmacists Union* (1940) 16 Cal.2d 379, 387; *Stephenson v. City of Palm Springs* (1959) 52 Cal.2d 407; *Chavez v. Sargent, supra,* 52 Cal.2d 162 (disapproved on other grounds, *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455, 475).) Secondly, appellants desire to use such approval in support of their position that such encouragement and protection constitutes state action for the purpose of bringing them within the protection of the federal Constitution. Whatever the reason, since the California Constitution was not relied upon in the brief or on oral argument, it will be treated as waived. (*Coronet Credit Corp. v. West Thrift Co.* (1966) 244 Cal.App.2d 631, 641-642; 6 Witkin, Cal. Procedure (2d ed. 1971), Appeal, §425, p. 4391.)

At the threshold we must determine if the cause has become moot by reason of the expiration of the contract between the union and growers of July 29, 1973.[3]

Events which occur during the pendency of an appeal may cause a matter to be moot (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129; *Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13), making it permissible to dispose of the appeal on that ground. In the case at bench, however, while the expiration of the contract has rendered the cause moot as to the declaratory and injunctive relief prayed for because no effectual relief could be granted (See *Paul v. Milk Depots, Inc., supra,* at pp. 132-133), the cause with respect to damages during the term of the contract is not moot; we therefore proceed to consider the matter on the merits with respect to the issue of damages only.

We turn to the controlling question of whether there is sufficient state action or action under color of state law to bring plaintiffs within the protection of the United States Constitution inasmuch as that instrument erects no shield against purely private conduct. (*The Civil Rights Cases* (1883) 109 U.S. 3; *Shelly v. Kraemer* (1948) 334 U.S. 1, 13.)[4]

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[3]This fact is before us by virtue of the terms of the contract which is part of the pleadings and is conceded by plaintiffs in their affidavit submitted in opposition to a motion to dismiss on the ground that the cause is moot.

[4]Though not raised or argued by the parties, we have serious doubt (1) that plaintiffs have sufficiently alleged action under color of state law or (2) that they can state a cause of action for damages under the federal constitutional provisions pursuant to which they seek protection in a state court absent federal statutory authorization therefor.

Under the Civil Rights Act (42 U.S.C. § 1983) a state court probably has concurrent jurisdiction with the federal courts to

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California has no statute or policy either requiring that collective bargaining agreements include union shop provisions or invalidating such agreements. No facts are alleged in the pleadings to indicate other than that the growers and union entered into the collective bargaining agreement herein through private negotiations and through the normal give and take of collective bargaining without any compulsion of California law.

What constitutes state action under a given set of facts is to be determined on a case-by-case basis. As

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entertain an action (*Long v. District of Columbia* (D.C. Cir. 1972) 469 F.2d 927, 937; *International Prisoners' Union v. Rizzo* (E.D. Pa. 1973) 356 F.Supp. 806, 810; contra: *Beauregard v. Wingard* (S.D. Cal. 1964) 230 F. Supp. 167, 185). However, the complaint does not allege the crucial requirement that the alleged deprivation of rights was "under color of state law." (*Place v. Shepard* (6 Cir. 1971) 446 F.2d 1239, 1244-1245; *Enrlich v. Van Epps* (7 Cir. 1970) 428 F.2d 363, 364; see *Seeley v. Brotherhood of Painters, Decorators, etc.* (5 Cir. 1962) 308 F.2d 52, 58.)

Aside from the Civil Rights Act, we find no federal statutory authorization for the instant action for damages. While *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.* (1971) 403 U.S. 388 [91 S.Ct. 1999] held for the first time that a damage action may be maintained in the federal court for an invasion of Fourth Amendment rights, we are persuaded that this authority probably cannot be invoked here because (a) that remedy is restricted to violation of Fourth Amendment rights (*Smothers v. Columbia Broadcasting System, Inc.* (C.D. Cal. 1972) 351 F.Supp. 622, 625-626; *Davidson v. Kane* (E.D. Va. 1972) 337 F.Supp. 922, 924), and (b) the remedy is a federal court remedy (see *Bivens, supra,* at pp. 396-397; *Breitwieser v. KMS Industries, Inc.* (5 Cir. 1972) 467 F.2d 1319 (cert. den. .... U.S. .... [93 S.Ct. 1445]; *Monarch Insurance Co. of Ohio v. District of Columbia* (D.D.C. 1973) 353 F.Supp. 1249; *Larez v. Oberti* (1972) 23 Cal.App.3d 217, 223-225).

In any event, we do not reach or pass upon these questions because of our disposition of the cause on the ground that there is not sufficient state action to invoke federal constitutional protections.

stated in *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 722:

> "It is clear, as it always has been since the *Civil Rights Cases* . . . that 'Individual invasion of individual rights is not the subject-matter of the amendment,' [citation] and that private conduct abridging individual rights does no violence to the Equal Protection Clause (and thus the Fourteenth Amendment in general) unless to some significant extent the state in any of its manifestations has been found to have become involved in it. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'this court has never attempted.' [Citation.]"

Evans v. Newton (1965) 382 U.S. 296, 299, instructs:

> "What is 'private' action and what is 'state' action is not always easy to determine. [Citation.] Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Appellants argue that the action of the union and owners in entering into the agreement constitutes state action because California has encouraged and protected

union shop agreements. They point to Labor Code section 921 outlawing yellow-dog contracts (*Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88* (1960) 53 Cal.2d 458, 470), Labor Code section 922 making it a misdemeanor for any person to coerce or compel any person to agree not to join a labor organization as a condition of employment, and Labor Code section 923 declaring it to be public policy that the individual workman shall have freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, free from interference of employers. They also point to Labor Code section 1126, making collective bargaining agreements enforceable in law and equity. Reference is also made to certain California decisions which uphold the validity of union security agreements (see *C. S. Smith Met. Market Co. v. Lyons, supra,* 16 Cal.2d 389; *Park & T.I. Corp. v. Int. etc. of Teamsters* (1946) 27 Cal.2d 599; *McKay v. Retail Auto S.L. Union No. 1067* (1940) 16 Cal.2d 311, cert. den. 313 U.S. 566; *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455; *Messner v. Journeymen Barbers, etc.* (1960) 53 Cal.2d 873), and finally to certain decisions which have held that local "right to work" ordinances are invalid becase the above referred to statutes preempt such local action. (*Stephenson v. City of Palm Springs* (1959) 52 Cal.2d 407; *Chavez v. Sargent* (1959) 52 Cal.2d 162 (disapproved on other grounds, *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455, 475); *Retail Clerks' Union v. Superior Court* (1959) 52 Cal.2d 222 (disapproved on other grounds, *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455, 475).)

In our view, however, the state policy so announced and the case decisions referred to do not change the fundamental fact that California has taken no action either to require the inclusion of a union shop provision in a collective bargaining agreement or to invalidate such a provision. A collective bargaining agreement without a union shop covenant is entitled to legal protection. The position of the state can best be characterized as one of benign neutrality in that labor and management are free from any hindrances upon opportunities to bargain collectively. The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions. Such passivity falls far short of the state action required to bring the federal constitutional protections into operation.

Mendoza v. United Farm Workers Organizing Committee (9 Cir. 1973) .... F.2d. ....[5] is a class action companion to the case at bench, commenced against the same defendants, regarding the same collective bargaining contract and seeking the same relief by a different party plaintiff farm worker. The Circuit Court affirmed the judgment of dismissal entered by the Federal District Court on the ground that the complaint failed to allege such state action as the Fourteenth Amendment of the United States Constitution requires. The court said:

> "The present complaint does not allege that the defendants entered into and performed their union

[5]Slip opinion filed September 7, 1973, No. 71-1930, United States Circuit Court for the Ninth Circuit.

shop agreement under any compulsion of California law rather than through the normal give and take of collective bargaining and labor-management relations. We add that we have found nothing in California law that coerces parties to include union shop provisions in a labor contract. In these circumstances, we agree with the district court that the complaint was inadequate."

In *Adams v. Southern California First National Bank* (9 Cir. 1973) .... F.2d ....,[6] the court held that the enactment of sections 9503 and 9504 of the California Commercial Code authorizing, codifying and recognizing a preexisting prejudgment self-help remedy by repossession and sale of secured property did not constitute sufficient state action to establish a federal cause of action under protections afforded by the United States Constitution. The court pointed to the fact that the codification was of a preexisting policy and "[t]here is no 'pervasive' state action directed to self-help repossession to require its use. It is simply named as one of two already existing alternatives." The court further stated that the State of California had not "significantly involved" itself in self-help repossession by virtue of having authorized such action in the statutory enactment under the test laid down by the Supreme Court in *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 173, where the court said: "Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself . . .' to fall within the ambit of the constitutional prohibition."

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[6]42 Law Weekly 2230, slip opinion filed October 4, 1973, United States Circuit Court of Appeal for the Ninth Circuit, Nos. 72-1484 and 72-1888.

In *Moose Lodge No. 107 v. Irvis, supra,* 407 U.S. 163, a black guest was denied service in the Moose Lodge bar, which was licensed as a private club by the Pennsylvania Liquor Control Board. Licenses were limited and the control board imposed a detailed regulatory scheme upon licensees. The court stated that, "The court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever" (407 U.S. at p. .... [92 S.Ct. at p. 1971]), and continues that ". . . the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'State action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." (407 U.S. at p. .... [92 S.Ct. at p. 1973]). In effect the court held that even a clear, detailed regulation and licensing control system, including quotas, does not represent state action where the precise rules or conditions limiting conduct are voluntarily agreed upon by the private parties engaged in private affairs. While this expression may demonstrate a trend away from prior expressions of the Supreme Court of the United States, we are nevertheless bound by it.

Appellants' reliance is placed principally on *Railway Employees' Department v. Hanson* (1956) 351 U.S. 225 [76 S.Ct. 714]). In that case Congress had enacted the Railway Labor Act, 45 U.S.C.A. § 151 et seq., which provided in part that a union shop was permissible notwithstanding the law of any state. (45 U.S. C.A. § 152 (Eleventh).) The court found that this

statute was enacted for the purpose of superseding inconsistent "right to work" laws in seventeen states which prohibited union shops. (351 U.S. 225, 231-232 [76 S.Ct. 714, 718].) Thus the court held that by so allowing union shop clauses, action undertaken pursuant to these contract clauses constituted governmental action sufficient to invoke the protection of the Constitution because without such congressional action the union shop clause would have been unlawful in those seventeen states.

Appellants assert that the *Hanson* situation is analogous to the situation in California because the Legislature has enacted laws which have been interpreted to preempt local "right to work" ordinances. (See *Retail Clerks' Union v. Superior Court, supra,* 52 Cal.2d 222; *Stephenson v. City of Palm Springs, supra,* 52 Cal.2d 407; *Chavez v. Sargent, supra,* 52 Cal.2d 162.) Nevertheless, there are crucial distinctions between *Hanson* and the situation here presented which dictate the conclusion that there is not sufficient state action here involved. To begin with, the California statute which has been interpreted to occupy the field and thus preempt inconsistent right to work ordinances does not, as did the Railway Labor Act, expressly refer to union shops. (See Lab. Code, §§ 921-923.) Secondly, the union shop has always been lawful in California and thus the enactment of the above referred to Labor Code sections did not divert from the traditional policy of the state. (*Shafer v. Registered Pharmacists Union, supra,* 16 Cal.2d 379, 387.) Furthermore, the local right to work ordinances did not originate until well after the enactment of the controlling sections of the Labor Code, while in *Hanson* the right to work laws were enacted prior to the union shop provision of the Railway Labor

Act which was designed to supersede them. These distinctions were recognized in *Otten v. Baltimore & O. R. Co.* (2 Cir. 1953) 205 F.2d 58 and *Wicks v. Southern Pac. Co.* (S.D. Cal. 1954) 121 F.Supp. 454 (affirmed 231 F.2d 130 (9 Cir. 1956), cert. den. 351 U.S. 946). In the *Otten* case, the plaintiffs sought an injunction prohibiting the defendant railroad from discharging him pursuant to a union shop provision authorized by the Railway Labor Act. The district court declined to convene the three-judge district court on the grounds that the constitutionality of the Railway Labor Act was not called into question. On appeal, the court, per L. Hand, J., held that it was proper not to convene the three-judge court because the constitutionality of the act could in no way have been called into question. The court reasoned that if the union shop had originally been unlawful in New York where the case arose and the Railway Labor Act was to the contrary, then there may have been sufficient governmental action to call into question the validity of the act. The court held, however, that since the union shop had always been valid under New York common law, then Congress' enactment of the Railway Labor Act was not sufficient governmental action as to this New York plaintiff to call into question the constitutionality of the act. (205 F.2d at pp. 60-61). The facts presented in the *Otten* case were almost identical to those presented in *Wicks v. Southern Pac. Co., supra,* 121 F.Supp. 454. In *Wicks,* the court held that since California, like New York, had always permitted the union shop, then the constitutionality of the act could not be questioned in that proceeding. (231 F.2d 130, 135-137; 121 F. Supp. 454, 456-457.)

It is thus concluded that the California policy of allowing union and closed shops and the consequent preemption of subsequently enacted inconsistent local ordinances does not constitute sufficient state action to invoke the sanctions of the federal Constitution.

Inasmuch as we have concluded that state action was not involved in the making or implementation of the collective bargaining contract between the union and the growers, plaintiffs cannot invoke the protection of the federal Constitution, and we need not treat the other questions raised.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Brown (Geo. A), *P. J.*

We concur:

/s/ Gargano, *J.*

/s/ Franson, *J.*

APPENDIX "B."

Order Denying Hearing After Judgment by the Court of Appeal, 5th District, Division ...., Civil No. 1736.

In the Supreme Court of the State of California, in Bank.

Gabaldon et al. v. United Farm Workers' Organizing Committee et al.

Appellants' petition for hearing DENIED.

Supreme Court. Filed: Jan. 31, 1974.

/s/ Wright
Chief Justice

APPENDIX "C."

Principal Constitutional and Statutory Provisions Involved.

FEDERAL CONSTITUTIONAL PROVISIONS:

1. First Amendment to the Constitution of the United States:

   "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fifth Amendment to the Constitution of the United States:

   "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Ninth Amendment to the Constitution of the United States:

   "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Fourteenth Amendment to the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutory Provisions.

Civil Rights Statutes:

28 USC § 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act

of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

42 USC § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
RS. § 1979.

Union Shop Provisions of the Railway Labor Act:

45 USC § 152, Eleventh:

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effec-

tive date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First

Division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended, May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.

Union Shop Provisions of the National Labor Relations Act:

29 USC 158(a)(3):

(a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B)

if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

California Statutes.

1. LABOR CODE, § 921:

"Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization,

(b) Not to join or not to remain a member of a labor organization or of an employer organization.

(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

2. LABOR CODE, § 922:

"Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employ-

ment or continuing in the employment of any such person is guilty of a misdemeanor."

3. LABOR CODE, § 923:

"In the interpretation and application of this chapter, the public policy of this State is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

4. LABOR CODE, § 1011:

"A person engaged in the production, manufacture, or sale of any article of merchandise in this State, shall not, by any label placed or impressed upon such article, or upon its container, misrepresent or falsely state any of the following as to the production of such article:

(a) The kind, character, or nature of the labor employed.

(b) The extent of the labor employed.

(c) The number or kind of persons exclusively employed.

(d) That a particular or distinctive class or character of laborers was wholly and exclusively employed, when in fact another class, or character, or distinction of laborers was used or employed either jointly or in any wise supplementary to such exclusive class, character, or distinction of laborers.

Violation of any provision of this section is a misdemeanor punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment for not less than 20 nor more than 90 days, or both."

5. LABOR CODE, § 1012:

"Any person engaged in the production, manufacture, or sale of any article of merchandise in this State, or any person engaged in the performance of any acts or services of a private, public, or quasi-public nature for profit, who wilfully misrepresents or falsely states that members of trades unions, labor associations, or labor organizations were engaged or employed in the manufacture, production, or sale of such article or in the performance of such acts or services, is guilty of a misdemeanor punishable by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail for not more than 90 days, or both."

6. LABOR CODE, § 1015:

"Any person who, without having an unrevoked written authority from such trade union, labor association or labor organization, wilfully forges or procures to be forged such label or trademark, with intent to sell or assist other persons to sell, any goods to which such forged label is affixed as having been made, manufactured, or produced in whole or in part by labor, laborers, or employees who are members of, or allied or associated with, such trade union, labor association, or labor organization, is guilty of a misdemeanor, punishable by a fine not more than five hundred dollars ($500) or imprisonment for not more than 90 days, or both."

7. LABOR CODE, § 1016:

"Any person who wilfully uses or displays the genuine label, trademark, insignia, seal, device, or form of advertisement of any association or labor union, in any manner not authorized by such association or labor organization or not in conformity with the by-laws thereof, is guilty of a misdemeanor punishable by a fine not exceeding one hundred dollars ($100) or imprisonment for not more than three months, or both."

8. LABOR CODE, § 1017:

"Any person who wilfully uses the card of any labor union to obtain aid, assistance, or employment, unless entitled to use such card under the rules and regulations of a labor union within this State is guilty of a misdemeanor."

9. LABOR CODE, § 1018:

"Any person who wilfully wears the button of any labor union of this State, unless entitled to wear the button under the rules of such union, is guilty of a misdemeanor, and is punishable by imprisonment in the county jail for not more than 20 days or by a fine of not more than twenty dollars ($20), or by both fine and imprisonment."

10. LABOR CODE, § 1126:

"Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

11. BUSINESS AND PROFESSIONS CODE, § 16703:

"Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity."

IN THE

Supreme Court of the United States

APR 5
MICHAEL RODA

October Term, 1973
No. 73-1345

JOSEPHINE GABALDON, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Response in Opposition to Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1345

JOSEPHINE GABALDON, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Response in Opposition to Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

Questions Presented.

1. Does enforcement by respondent labor organization and employers of their collective bargaining contract involve "state action" repugnant to the United States Constitution on the ground that the statutes and decisional law of the State in general have authorized, approved, and encouraged the institution of the "union shop"?

2. Do the provisions of the collective bargaining agreement which: condition employment upon becoming a union member within seven days from being hired; require labor recruiting to be undertaken through a "hiring hall"; oblige the employer to discharge any

worker the union has determined to have engaged in antiunion activity; and establish a "check-off" system whereby the employer deducts union initiation fees, dues and assessments from the employees' wages *ipso facto* violate the workers' constitutional rights secured under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution?

Statement of the Case.

1. California has not become involved in any way in the private collective bargaining agreement here, but has adopted and maintained a consistent statewide policy of neutrality in the field of labor relations. Therefore, there has been no transformation of what formally appears to be no more than private action into "state action" or "action under color of state law". Petitioners therefore have failed to allege facts sufficient to state a claim justiciable by this Court.

2. No provision of the contract on its face denies the freedom of association, the right to work, the freedom of thought or any other right Petitioners broadly assert to be denied thereunder. Nor is there any claim by Petitioners that any provision was applied in violation of such rights. The extent to which any rights are impinged upon must be tolerated, for the "union shop" and the "closed shop" promote the long-term interests of individual workers as well as the work-force as a whole.

California Court of Appeals Holding That Petitioners do not Allege Facts Sufficient to State a Claim of "State Action" or "Action under Color of State Law" is Based on Clear Understanding of this Court's Decisions.

Petitioners assert that the policy of the State of California respecting union security agreements is so insistent, encouraging and protective that such arrangements concluded in the private sphere come thereby to acquire a "public" rather than a private character. On this point reference is made by Petitioners to legislative enactments and judicial decisions which uphold the validity of union security agreements. Reference is also made to court holdings which invalidate local right-to-work ordinances on the ground that such local action is preempted by state law.

Petitioners' pleadings contain no allegations that any governmental agency participated in negotiations between the grower and the union or in constructing the ultimate collective bargaining agreement. Nor was it said, nor could it be said, that the State of California is indirectly involved in reaching a particular result. It provides neither guidelines nor administrative machinery for the collective bargaining process.

In California, there is no legislative or administrative scheme comparable to that provided by the National Labor Relations Act for agricultural workers. The California law does no more than codify the right of working people to organize; employers are not compelled by law to recognize or bargain with workers' representatives.

It is far-fetched to suggest, as Petitioners do, that California law requires a particular result of bargaining.[1] Collective bargaining agreements are not invalidated either for the reason that they contain union se-

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[1]See Appendix A, attached hereto: Denial of Writ of Certiorari by U.S. S. Ct. (Feb. 19, 1974) in nearly identical case—*Mendoza, et al. v. U.F.W.O.C., et al.*, No. 73-884.

curity clauses or for the reason that they are without such. In the words of the California Court of Appeals, in its decision below:

> The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions. Such passivity falls far short of the state action required to bring the federal constitutional protections into operation.

The California Court of Appeals based its holding, to the effect that Petitioners fail to state a claim for relief, on this Court's reasoning in *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 165. There, the regulations were considerably more detailed and the enforcement much more pervasive in the State's relationship to the private operation. Yet, despite Pennsylvania's involvement in liquor distribution by private clubs such as the Moose Lodge, it was held that the "scheme * * * does not sufficiently implicate the State in the discriminatory guest policies * * * to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U.S. at 178. It was concluded that though the State was deeply and elaborately involved in the system of alcohol distribution, it was not so intertwined with the racial discrimination of the private club as to make it indistinguishable from it. Here, California governmental agencies are involved in collective bargaining (in nowhere near the same degree), let alone in the particular conse-

quences which might flow from union security provisions. As a consequence, there is similarly no "state action".

The reliance of Petitioners upon the case of *Railway Employees Department, AFL v. Hanson,* 351 U.S. 225 (1956) is misplaced. They contend that it is authority for their position that "state action" is present in the case at bar. There, it was found that the federal government, by reason of its assertion of authority to invalidate State right-to-work laws which threatened the freedom to bargain of parties covered by the Railway Labor Act, had created a "federal imprimatur on union shop agreements." Petitioners point out the analogous posture of the State of California *vis-a-vis* union or closed shops: protecting and encouraging creation of collective bargaining agreements which contain such provisions. They assert that the finding of an official "imprimatur" in *Hanson ipso facto* demands a conclusion that "state action" is present here.

In *Hanson* this Court did not consider the standard of "state action"; it examined the degree of *federal* involvement in protecting union security provisions affecting employees covered by the Railway Labor Act. Moreover, it bears noting that not only was the federal involvement found to be meager, but differences between it and that of the State of California in this case render that of the latter miniscule in comparison.

Though the Court termed the policy of the federal government as creating an "imprimatur", a "stamp of approval", the expression of policy was found to be no more than permissive towards the collective bargaining process. There, as here, the government did no more than prevent restriction of alternative solutions avail-

able to labor and management. Lower levels of government were barred from interfering. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), this Court assumed the identical role regarding governmental attempts to restrict the alternative solutions for promoting "open housing". Prevention of such restrictions does not present the nature or degree of involvement constituting "state action" under the Fourteenth Amendment.

There are important differences between the federal scheme and that presented by the State of California. The distinctions drawn by the California Court of Appeal, between the situation presented by the *Hanson* case and that before this Court, are well taken. (See Appendix A of Petitioners' Petition for a Writ of Certiorari, pp. 12 and 13.)

> Requirement of Association by Employee With Majority Representative of Co-Workers, When Balanced Against Long-Term Interests of Working People, is Consistent With Definition of Rights Guaranteed by the United States Constitution.

The Bill of Rights establishes goals for a society in which individuals are free to function as economically, politically and socially creative members of a community. The enunciation of those rights is an honored statement respecting the individual integrity of all citizens, the dignity to be accorded to each, as well as the individual potential to operate productively on both the material and the intellectual levels. At the same time, the recognition and protection of rights specifically defined by various of the Amendments to the United States Constitution is a vehicle for governing the relations of citizens.

The assertion of rights protected by the Constitution moves the society towards the attainment of the goals set forth in the Bill of Rights. The definition of these "rights" is refined in the process. What the "right" means in a particular situation is defined by consideration of what the framers of the Constitution had in mind as means to the end of a free, just and decent society.

In the context before the Court, an assessment must be made concerning the assertion of the "right to freedom of association". Does the "right" require that the union and closed shop be barred? We ask, in answering that question, whether that definition of the freedom of association is consistent with the goals of our society. Would that definition enhance the economic justice and resultant political productivity of all citizens of the self-governing society envisioned by the framers of the Constitution?

In *Hanson,* this Court concluded that Congress found the interests of working people to be enhanced by trade unionism, and found further that union security clauses enhance the development of strong trade unions. By passing the Railway Labor Act, Congress determined the long-range right of association to require flexibility in labor relations. The societal goals set forth in the Bill of Rights will be enhanced by ensuring union and closed shops, for trade unionism is a progressive element in economic and consequently political relations among groups of citizens.

Petitioners here do not allege, nor could they allege, that conditions have been imposed or that any monies were paid to the union pursuant to the union shop arrangement, to force ideological conformity or to other-

wise contravene First Amendment freedoms. As described by the Petitioners' pleadings, there is nothing to render this union shop different from that upheld in *Hanson* as a stabilizing force which justifiably requires all those covered by the collective bargaining agreement to pay the cost of securing and enforcing it.

Respondents urge this Court to conclude, as it did in *Hanson,* that the requirement of association with the majority representative of the workers, to the extent of requiring payment for the cost of securing and enforcing collective bargaining agreements, is a natural and necessary consequence of protecting the freedom of association. These union and closed shop arrangements are not only consistent with but are conducive of the exercise of rights guaranteed by the Bill of Rights.

Conclusion.

For these reasons a Writ of Certiorari should not issue to review the judgment and opinion of the Court of Appeal, Fifth Appellate District of the State of California.

Dated: April 4, 1974.

Respectfully submitted,

JAMES VANCE HENRY,
JEROME COHEN,
Counsel for Respondents.

APPENDIX A.

Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543.

Jonathan C. Gibson, Esq.
707 Broadway, Suite 1212
San Diego, Calif. 92101

Re: Mendoza, et al. v. United Farm Workers Organizing Committee, et al., No. 73-884.

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

James Vance Henry, Esq.
900 M St.
Fresno, Calif. 93721

SUPREME COURT, U. S.
FILED
APR 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 731345

JOSEPHINE GABALDON, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

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IN THE

Supreme Court of the United States

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JOSEPHINE GABALDON, *et al.*,

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vs.

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Respondents.

REPLY BRIEF OF PETITIONERS.

I

California Action in Authorizing and Fostering Union Shop Constitutes Governmental Action.

Respondents contend that California maintains a policy of neutrality in labor relations and that its legislature and Supreme Court have done no more than to uphold the validity of the union shop. They thus seek to uphold the decision of the Court of Appeal that the position of the state is one of benign neutrality towards the union shop, one of passivity toward the arrangement, one of absence of regulation. All of this is in flat contradiction to what the Supreme Court of the state had some years before held in sustaining the validity of the union shop. In so holding, it had expressly based its decisions on the ground that the union shop is authorized, permitted, encouraged and protected under the statutes of the State. Those statutes must be read as the

highest court of the State has construed them. So read they inescapably constitute state action in favor of the union shop under the unbroken line of decisions of this Court holding that state action is present where the state authorizes and encourages a particular form of private contract or conduct. This Court specifically held in *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225, 232 (1956) that a statute authorizing a union shop agreement between private parties constitutes governmental action.

The respondents invoke the erroneous application of the court below of the decision of this Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 165 (1972) to the facts of the case at bar. In so doing they fail to observe the critical distinction between general state regulation of all or part of the business of a private person or corporation on the one hand and the specific authorization, encouragement and protection of the particular conduct which is the subject matter of complaint on the other hand. The principal question in *Moose Lodge* was whether the strict general regulation by the state of the sale of alcoholic beverages by the club constituted state action in compelling or authorizing racial discrimination in the service of food and drinks on the club premises.

The Court held that the general regulation of the club's sale of alcoholic beverages did not constitute state action on the subject of racial discrimination because it was not directed to and did not in any way foster and encourage such discrimination, saying in part:

> "However detailed this regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." (407 U.S. at 176, 177).

In the case at bar, the Supreme Court of California has not only held that the statutes of the state foster and encourage the union shop, but also that they permit and authorize the arrangement. What California has done amounted to State action because it was directed to the specific cause of complaint.

II

Case Here Raises Constitutional Questions of the Utmost Gravity Reserved in Previous Decisions of This Court.

Respondents contend that on the merits this case is governed by *Railway Employees Dept. AFL v. Hanson, supra,* 351 U.S. 225 (1956) which upheld a union shop against an attack upon its constitutionality. But the union shop there was very different from the one involved here, since it required no more than that the employee compensate the union for its services as collective bargaining representative. Quite true, the arrangement was, as here, subjected to attack for violation of a broad range of liberties protected by the First and Fifth Amendments. Thus the Court said:

> "Wide-ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights. It is said that once a man becomes a member of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology." (351 U.S. at 236, 237).

The Court held that those questions were not involved in the agreement then before it merely requiring compensation to the union for its services, but would be decided when they arose, saying:

> "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on §2 Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement." (351 U.S. 238.)

Subsequently, in *International Machinists v. Street*, 367 U.S. 740 (1961), a group of employees sued alleging that the money they were compelled to pay to hold their jobs was used in substantial part for political and ideological purposes in violation of the Bill of Rights. The defendant unions, like the respondents here, argued that the claims made had been rejected in the decision of this Court in *Hanson*. This Court rejected that defense holding:

> "Thus all that was held in Hanson was that §2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally author-

> ized to act as their collective bargaining agents * * * Clearly we passed *neither upon forced association in any other aspect* nor upon the issue of the use of exacted money for political causes which were opposed by the employees." (367 U.S. at 749) (Emphasis added.)

The court in *Street* then went on to say that the question regarding the use of forcibly exacted funds for political purposes had been reserved in *Hanson*, and that the issues there reserved are of the utmost gravity. The Court said:

> "The record in this case is adequate squarely to present the constitutional question reserved in Hanson. These are questions of the utmost gravity." (*Id.*)

The Court concluded, however, that it was unnecessary to decide the constitutional issues in *Street* because the use of the dues of the employees for politics over their objection was contrary to the statute. The broad constitutional questions going beyond the forced exaction of money for the support of the union and the use of that money for politics and consisting of the other things done pursuant to a full union shop agreement by forcing men into ideological associations which violate their right to freedom of conscience, freedom of association and freedom of thought protected by the Bill of Rights, and subjecting them to vast disciplinary control, which were reserved both in *Hanson* and *Street*, are presented for determination in the case at bar.

The respondents contend that the union shop in the case at bar merely requires association of the employee with the majority of his company workers (OB 6).

But the complaint here alleges, as stated by the Court below, that the union does not "represent a 'majority or substantial portion of the agricultural workers' " (A-2)—a fact that illumines the reason for the power given by the agreement to the minority union to procure the discharge of any worker for anti-union activity—the raw power to intimidate and subdue the majority. Again as stated by the Court below, "membership in defendant union is a condition of employment * * * employees * * * must become members * * * within seven days * * * or suffer termination." (A-2). There being no qualification of this requirement, but only further provisions for augmentation of union power over the workers, the agreement clearly calls for a full union shop which coupled, as here, with a hiring hall, is almost a closed shop—the harshest type of compulsory union membership.

The complaint further alleges, as stated by the court below, "that as a consequence of the enforcement of the agreement plaintiffs and members of the class have been threatened with discharge, have in fact been discharged, demoted, subjected to job classification, discrimination, transfer, and have been refused employment." (A-4). The allegations of the complaint regarding an agreement for an unrestricted union shop requiring membership in a private organization as a condition of employment in violation of the constitutional rights of petitioners are sufficient as a short and plain statement of the claim giving the respondents fair notice of the claim upon which it rests. It entitles them to a hearing on the merits, *Conley v. Gibson*, 355 U.S. 41, 48 (1957), which have been denied to them by the California courts.

Conclusion.

It is respectfully submitted that a writ of certiorari should be issued as prayed for in the petition so that there may be review of the grave constitutional questions regarding compulsory union membership expressly reserved by this Court in *Hanson* and *Street*.

Dated: April 15, 1974.

Respectfully submitted,

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